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HR 1316 – 527 Fairness Act of 2005

Mr. Chairman, Members of the House Administration Committee. Thank you for the opportunity to appear before you today to offer my thoughts on the proposals introduced in the 109th Congress regarding changes to the federal campaign finance law. I want to commend this Committee for taking time to thoughtfully and carefully consider the issue of campaign finance – AGAIN. This Committee under your leadership, Mr. Chairman, has given this issue more thoughtful and careful consideration than any other committee of the Congress and we appreciate your ongoing concern about the impact of various proposals and, most importantly, your sensitivity to the First Amendment of the Constitution implicated by various proposals for regulation of political speech.

When I last appeared before this Committee, on June 14, 2001, when you were considering Shays-Meehan before it ultimately was enacted as the Bipartisan Campaign Reform Act of 2002, I drew an analogy for the Committee. Quoting from my testimony four years ago, I said then, "I am reminded of the situation a number of years ago when Jim Jones took his People's Temple from San Francisco to Guyana – and got hundreds of people one day to drink poisonous Kool-Aid in a mass suicide. I've always wondered why *someone* didn't look up and say, "Hey, what's in this Kool Aid?"

I urged the Committee and the Congress at the time to be VERY careful – and to study carefully campaign finance regulation and to say, "What's in this campaign finance Kool-Aid?" And as I recall, then ranking member Rep. Steny Hoyer took exception to my analogy and stated quite emphatically that the Congress had studied and studied the issue and knew very well what was in the legislation and that it was time for Congress to pass the bill into law.

With all due respect, I do not believe that many members of Congress really understood the implications of what is now the law of the land...and had they known and truly understood it, perhaps it would not have been enacted. But it was. Many of us watched in dismay as the Republican controlled Congress passed BCRA, the Republican president signed it...and most distressing of all, that the

Supreme Court upheld it *virtually* in its entirety. I will turn momentarily to one of the very few provisions of BCRA that the Court did not uphold, and which form the basis of the proposal by Rep. Pence and Rep. Wynn.

Today, we are here and we find ourselves before the Committee reviewing proposals to take more legislative action in the campaign finance arena, to address what some people have called "unintended consequences" of BCRA.

Some, such as Rep. Shays and Rep. Meehan, have introduced a bill similar to the one introduced in the Senate which would approach the issue of the 527s and their future in the campaign finance regime in the same way they approached BCRA: with the purpose of *more* federal regulation of political speech and association, *more* subjecting of citizens and citizens groups to federal regulation rather than state, local or none and *more* complicated provisions...with unintended consequences that no one will know until we have completed yet another election cycle.

I urge the Committee today to adopt a different approach: One that will untangle some of the problems created by BCRA and other problems not created, but exacerbated, by BCRA – and which do require legislative relief. Adopt the approach offered by Rep. Pence and Rep. Wynn in the 527 Fairness Act of 2005.

The Committee should not allow the same forces who brought us BCRA and *its* aftermath to now dictate another set of far-reaching regulations but little-understood consequences of political speech and activity by the American people.

Case in point: In my prior testimony in 2001, I introduced into the record a report which I had prepared and published a few months earlier entitled Who's Buying Campaign Finance Reform? which traced the funding and wealth of the campaign finance reform movement. In that report, I included a chapter which looked forward at the political and campaign finance landscape should BCRA become law. The title of that chapter? "Ok, Fine, Let George Soros Replace the DNC".

For the authors of BCRA to now come forward and ask Congress to once again 'trust them' as to the consequences of yet another complex piece of campaign finance legislation is the ultimate chutzpah. Congress should be very leery of letting these same forces write this round of legislation.

Rather, Congress should look to new people and new approaches. Simple. A bill that allows everyone to know when it is passed exactly what it will do and not be 'surprised' again by its ultimate consequences.

In that regard, I am here to support and endorse HR 1361, the 527 Fairness Act of 2005 by Rep. Pence and Rep. Wynn – because it is simple and it addresses specific problems in the law. And, notwithstanding my opposition to BCRA when it was passed by Congress in 2002, it is now the law and I do not believe Congress has any stomach for its repeal or rollback. Thus, it

is important to note that the proposal by Reps. Pence & Wynn makes some needed and important changes in the law, but does *nothing* to eliminate, change or unwind the key principles of BCRA.

With that in mind, let me turn to the key provisions of Pence-Wynn and why I believe that this is the right approach for Congress to take and why these changes in the law are so important and necessary.

The stated reason for passing any legislation now is to "address the problems of the 527s..." The Pence-Wynn bill does that, hence, its title, "the 527 Fairness Act of 2005". But HR 1361 does so in a way that does no further harm to the First Amendment.

HR 1361 is aimed at strengthening political parties *vis a vis* the 527s, restoring basic communications capabilities to citizens organizations and grassroots groups just as the 527s had during the 2004 campaigns, and gets rid of thirty years worth of micromanagement by the FEC of trade associations' ability to establish and run their PACs, a change that is long overdue. All of these changes are simple, but essential to restore fairness and balance in the system.

I. The first and truly *most* important provisions of Pence-Wynn are those which strengthen the political parties. There are three such provisions in the bill:

1. Elimination of the coordinated spending limits by political parties in support of their nominees for federal office;
2. Elimination of the *aggregate* contribution limits for hard dollars contributed by individuals;
3. Authorization for state parties to spend state-regulated dollars for voter registration and sample ballots, rather than requiring state parties to spend federally regulated dollars for such activities.

1. Elimination of the political party committees' coordinated spending limits. This is an anachronism which Congress should eliminate. Spending limits for the political parties were established in the 1974 amendments when FECA (Federal Election Campaign Act of 1971) was substantially amended following Watergate and which brought us the basic regulatory scheme we live under today. Spending limits were imposed not only for the political parties but for candidates as well. The Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976) struck down as unconstitutional the expenditure limits on candidates' campaign committees, saying, " Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."

However, the issue of the political parties' coordinated spending limits were not before the Court in *Buckley* and were not presented to the Court for twenty years thereafter. In 1996 (*Colorado I*), the Supreme Court determined that the government could not constitutionally limit independent expenditures by political parties for their candidates. However, the Court was split over the question of whether coordinated expenditures could be constitutionally limited and remanded the case for development of a factual record. Both the trial court and the Tenth Circuit

Court of Appeals subsequently ruled that coordinated spending limits on political parties were unconstitutional. However, when the case known as Colorado II was decided by the Supreme Court in 2001, the Court ruled that Congress could impose limits on coordinated party expenditures – but largely because parties could still engage in unlimited spending 'independent' of their candidates.

BCRA's authors tried to reverse the ruling of the Supreme Court in Colorado I by requiring political party committees to choose between making coordinated or making independent expenditures on behalf of their candidates. However, the Supreme Court in *McConnell v. FEC*, *invalidated* that provision of

BCRA, one of only three provisions struck down by the Supreme Court in the *McConnell* case.

The *McConnell* court determined that forcing political party committees to choose between independent and coordinated expenditures was / is unconstitutional. Thus, the current state of play is this: A party committee can make expenditures subject to a statutory limit: in 2006, the limit for House candidates will be slightly more than last year's limit of $76,600 which is the combined national *and* state party committee coordinated spending limit for House candidates from states with more than one House district. Expenditures *above* that amount must be made by the party committee 'independent' of its nominees and candidates. What is the result?

- Parties and candidates must establish unnatural and largely artificially defined 'firewalls' in order for parties to make expenditures that can be arguably 'independent'. We've read articles in the last cycle about people going into and out of separate doors of the same building to create an illusion of 'independence'.

- Parties create separate IE units whose job is to develop and spend the IE budgets, separate from the parties' overall plans for the cycle and lacking formal supervision by the party leaders

- The IE units have less accountability and oversight from the party leadership, particularly elected officials who chair the party committees – for fear of having the communications deemed to have been 'coordinated' with the candidates

- There is less accountability for the message. Independent expenditures tend to be more harsh and more 'negative' -- the opposite result intended

- Parties can more actively and legitimately recruit <u>non-wealthy</u> candidates for Congress... the parties can budget and spend whatever hard dollars they can raise to help the non-wealthy candidates – and can do so in cooperation *with* the candidate and his/her campaign

It is time for Congress to void this legal fiction. The party committees exist to raise funds and votes in support of their candidates – that is what they are

supposed to do. They ought to be able to do so in concert with their candidates. It is simply not possible for parties to corrupt their candidates and vice versa . . . which used to be a legal standard against which these things were judged and still ought to be.

Every penny spent by a party committee should be coordinated with a candidate in order to temper the message, allow a consistent party campaign theme and insure accountability of the content of the expenditure and the dollars spent.

Congress has already recognized the importance of allowing party committees coordinated spending limits to be lifted in the case of the Millionaire's Amendment: when a wealthy, self-financed candidate triggers a certain level of his/her own spending, the party's coordinated spending limits are removed.

This is not insignificant: when the stakes are such that the party needs to be able to make expenditures to support or help one of its candidates, Congress has already agreed that the party should be allowed to do just that, without having to establish separate consultants, separate doors to the campaign or party headquarters and the endless list of silly and expensive lengths to which parties and candidates must now go to avoid 'coordination'.

Individual wealthy donors today can spend unlimited amounts of their own money attacking or supporting any candidate for office. Political parties can do that as well – but political parties should not be forced by law to feign independence from their own nominees in order to be able to do what George Soros or Peter Lewis can do.

2. Removal of the aggregate contribution limits imposed on individual donors. This does not change any of the contribution limits from an individual donor to any federal political candidate, party committee or the federal account of a state party. Rather, this would allow those individuals who are capable of doing so to give to as many federal candidates and party committees as he or she desires. I have attached two charts to my testimony which demonstrates at a glance two things: Exhibit A depicts the very complicated formula of aggregate contribution limits established by BCRA. Exhibit B depicts elimination of the complicated *aggregate* limits while leaving in place the hard dollar limits on contributions to each recipient candidate, party committee or PAC.

Removing the aggregate limits would have two effects:

*first, the national party committees would no longer be competing with each other to raise their hard dollars. Now, an individual cannot give the maximum allowed by law each year to both the NRCC and the NRSC, much less to the RNC as well. The three national committees of each party are competing *internally* with one another rather than competing with the other party for the maximum contributions from their wealthy donors. The only people who give these large contributions are those of both parties who have the means to do so, the allegiance to the party and personally believe strongly enough in the mission and purpose of the party and its candidates to make those contributions. It simply makes no sense to require the party committees to compete with each other for these limited hard dollars.

* second, this would provide an incentive for donors to support the party committees rather than private 527 committees. It would allow the party committees to compete with wealthy individuals and private entities and *encourage* donors to stay within the party structure, rather than providing incentives to seek ways *outside* the political parties as a means of augmenting the parties' ability to support their candidates.

* third, the current law is far too complicated to expect ready compliance. In my work with various members of Congress and staff, I find that most cannot explain the current law (which is why I prepared the charts to depict the current law and proposed change). The campaign finance laws should be simple in order to encourage compliance. The aggregate contribution limits are far from simple – and I defy any member of this Committee or 99% of the members of Congress to be able to explain without a 'cheat sheet' what the law actually says.

This change in the law would not affect multitudes of individuals nationwide. But it would change the incentive structure and allow the party committees to work in tandem rather than at odds to identify and pursue those donors who can and would contribute to and through the parties to support the party's candidates and issues – rather than the current situation where the law encourages intra-party competition for the same hard dollars.

These are not soft dollars. These are hard dollars – and there should be no reason why an individual should be able to spend his or her money in unlimited amounts on ads or other purposes attacking or supporting the party or candidate of his/her choice, but that same wealthy individual cannot contribute within the legal limits to each candidate or party committee he / she chooses.

II. Restore the free speech rights of grassroots organizations and citizens groups by repealing the Wellstone Amendment. The Senate added to McCain-Feingold on the Senate floor an amendment offered by Sen. Wellstone that requires citizens' organizations to establish federal PACs in order to be able to engage in electioneering communications. That was not the original intent of the authors and, in fact, most of the supporters of McCain-Feingold opposed the Wellstone Amendment. It was adopted and upheld by the Supreme Court. This is one of the most egregious provisions of BCRA – and it was not part of the bills as drawn by the reformers.

HR 1361 proposes the repeal of the Wellstone amendment – restoring the language of what was originally known as Snowe-Jeffords and expanding it to include all grassroots organizations, not just 501c(4) social welfare groups. I have also been in discussions about this provision with various representatives of grassroots organizations and at their suggestion, I have attached as Exhibit C to my testimony some additional proposed language to clarify *in the statute* that membership dues from individuals can be used for this purpose.

It should not be the case (but it currently IS the law) that one individual can spend $1 million dollars of his/her own money to make communications about a candidate or political party before an election but one million people joining together and giving $1 each cannot make a similar communication through a membership organization. There is something badly wrong

with a system that rewards the wealthy and gags everyone else in the country not wealthy enough to pay from their own pockets for radio or television ads.

And rather than trying to gag even more kinds of groups of citizens, why not allow membership organizations to use their dues money *from individuals only* to speak on their members' behalf.

More freedom, not less, should be the objective.
Less government regulation, not more, should be the goal.

III. Repeal the arcane restrictions on trade associations' ability to raise money for their PACs, and index PAC contributions. The 1974 amendments which spawned political action committees included restrictions that simply don't belong in federal statute: the requirement that a corporation can only grant permission to one trade association PAC per year to solicit the corporation's executives and management employees *and* an arcane system for obtaining that approval. It is a system that makes little sense and is very cumbersome to make work in real life.

And indexing PAC contributions will insure that in coming years, people who band together making small contributions to PACs will still be competitive with the contributions of wealthy individuals – the premise of political action committees in the first place.

In sum, HR 1361 takes some simple but important steps in keeping with these principles:

1. The political parties should be restored to their rightful role in the federal campaign framework – and the ridiculous limitations on political parties' capacity to support their own candidates should be repealed, creating stronger parties and greater accountability.

2. Individuals with small amounts of money should be able to associate within organizations and committees of their choosing to make their collective voices heard *through* their organizations – enabling large numbers of small donors to compete in the political process with the small number of wealthy individuals.

3. Wealthy individuals should be encouraged, not discouraged from, contributing to the political parties.

None of these proposals eliminate any key provision of BCRA. Federal officeholders and parties must still function within the same hard dollars established under BCRA—no soft money, no changes in the basic framework of BCRA.

But these are adjustments that need to be made in the law to restore fairness and equity in the process. I thank you for your consideration of and support for HR 1361, the 527 Fairness Act of 2005. Thank you.